VISAGE CONTINENTAL SDN BHD

v.

SMOOTH TRACK SDN BHD

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
RICHARD MALANJUM JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO: B-03-54-2001]
13 SEPTEMBER 2007

COMPANY LAW: *Winding up - Petition - Opposition to winding up - Fairness - Bona fide dispute - Estoppel - Whether petition incompetent to proceed*

This was an appeal by the appellant against the decision of the High Court, wherein upon the presentation and hearing of the petition filed by the respondent under s. 218 of the Companies Act 1965, it was ordered that the appellant be wound up. Both parties had entered into an agency agreement which the respondent subsequently terminated, resulting in both parties claiming and counterclaiming against each other. The appellant submitted that the learned High Court judge should have adjourned the hearing of the winding up petition since the parties were still negotiating a settlement. The respondent had agreed to a short adjournment but had then, on the day of the hearing, insisted for the hearing to proceed knowing full well that the appellant was no longer within the seven-day requirement to file an affidavit in opposition. The appellant further argued that the winding up was premature since the debt was disputed, there was no court judgment and the appellant had a cross-claim in the sum of RM400,000 against the respondent. The respondent, on the other hand, contended that since the winding up petition was in order and there was no affidavit in opposition filed by the appellant, the learned judge had no choice but to hear it in the exercise of his discretion and make the order accordingly. It was also averred that the learned judge was correct in not granting the adjournment since the appellant had only come to court to seek an adjournment, without making any preparation to answer the winding up petition.

Held (allowing the appeal)
Per Richard Malanjum JCA delivering the judgment of the court:

(1) In the present appeal, it was obvious that the main reason for the learned judge in not granting an adjournment was that the appellant came to court without making any preparation for the hearing except to seek an adjournment. There was no affidavit in opposition filed. The learned judge however should have at least listened and considered the explanation given by the appellant, and sought verification from the respondent. In that way, fairness and fair play would have been maintained. The respondent did not dispute the fact that the parties were negotiating before the hearing and that there were meetings between the parties to verify the claims and the cross-claims and set-offs. There was also no dispute that the respondent retracted after agreeing at first to a settlement in the sum of RM184,000. Hence, there must be truth in what was asserted before the learned judge. Accordingly, the learned judge should have at least given the appellant the opportunity to be heard and the time perhaps to file an affidavit in opposition even if he viewed that the petition was in order. The respondent failed to practice fair play in this instance. Indeed, the importance of the fundamentals of fair play had been recognized in meetings and domestic enquiries, and there was no reason why the same principle should not apply in judicial hearings. On this ground alone, the appeal should be allowed. (paras 36, 37, 38 & 39)

(2) In the event that it was wrong to just allow the appeal when the matter could have been sent for rehearing, premised on what was said before this court and not disputed by the respondent, the petition was incompetent to proceed. It was not disputed that the parties had indeed agreed to have the accounts verified first before the final figure could be ascertained. Thus, the figure and claims could be said to be vague, bordering on an abuse of process by the respondent. As such, it could not be said that there was no *bona fide* dispute on the claims. The only shortcoming was the failure of the appellant to file an affidavit in opposition, but given the reason, which was not disputed by the respondent, the explanation for such failure was reasonable in the circumstances. If not for the last-minute retraction by the respondent, the matter might not have even reached the court.

A party should not be allowed to approbate and reprobate, it being unconscionable and plainly unfair. The respondent should also be estopped from denying that it had earlier agreed to a settlement and the sum payable. For it then to say that it was a typo error was indeed unfair and unreasonable. (paras 40, 41 & 42)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi di mana, ekoran pengemukaan dan pendengaran petisyen yang difailkan oleh responden di bawah s. 218 Akta Syarikat 1965, mahkamah memerintahkan supaya perayu digulung. Kedua-dua pihak telah memasuki satu perjanjian agensi yang kemudian ditamatkan oleh responden, sekaligus mencetuskan tuntutan dan tuntutan balas oleh mereka masing-masing. Perayu berhujah bahawa yang arif hakim Mahkamah Tinggi sepatutnya menangguhkan pendengaran petisyen penggulungan kerana pihak-pihak masih lagi dalam perundingan untuk mencapai penyelesaian. Responden bersetuju kepada satu penangguhan pendek, namun, pada hari pendengaran, menuntut supaya pendengaran diteruskan, walaupun mengetahui bahawa perayu sudah tidak mempunyai masa untuk mematuhi tempoh tujuh hari untuk mengemukakan afidavit menentangnya. Perayu juga berhujah bahawa penggulungan adalah pramatang kerana hutang telah dipertikai, tiadanya penghakiman mahkamah dan kerana terdapat tuntutan balas oleh perayu sebanyak RM400,000. Responden, sebaliknya, berhujah bahawa oleh kerana perintah penggulungan adalah teratur, dan tidak ada afidavit menentang difailkan oleh perayu, maka yang arif hakim tidak mempunyai pilihan melainkan mendengarnya berdasarkan budi bicaranya dan seterusnya membuat perintah-perintah sekadarnya. Juga ditegaskan bahawa yang arif hakim betul dalam tidak membenarkan penangguhan kerana perayu hanya datang ke mahkamah untuk memohon penangguhan tanpa membuat sebarang persediaan untuk menjawab petisyen penggulungan.

Diputuskan (membenarkan rayuan)
Oleh Richard Malanjum HMR menyampaikan penghakiman mahkamah:

(1) Dalam rayuan semasa, adalah jelas bahawa alasan utama yang arif hakim tidak membenarkan penangguhan adalah bahawa perayu datang ke mahkamah tanpa membuat sebarang persediaan untuk pendengaran kecuali untuk memohon penangguhan. Tidak ada afidavit menentang difailkan. Apapun,

yang arif hakim sepatutnya dan sekurang-kurangnya mendengar dan mempertimbang penjelasan perayu, sambil mendapatkan pengesahan-penjelasan dari responden. Dengan berbuat demikian, keadilan dan kesaksamaan dapat ditegakkan. Responden tidak mempertikai fakta bahawa pihak-pihak masih lagi berunding sebelum pendengaran tersebut dan bahawa perjumpaan-perjumpaan telah diadakan di antara pihak-pihak untuk mengesahkan tuntutan-tuntutan, tuntutan-tuntutan balas dan set-off yang berbangkit. Juga tidak dipertikai bahawa responden telah menarik balik persetujuan awalnya untuk menyelesaikan perkara pada jumlah RM184,000. Oleh itu, ada kebenarannya mengenai apa yang dihujahkan di hadapan yang arif hakim. Ianya mengikut bahawa, yang arif hakim sepatutnya memberikan perayu sekurang-kurangnya peluang untuk didengar dan kemungkinan juga masa untuk memfailkan afidavit menentang walaupun beliau berpendapat petisyen adalah teratur. Responden dalam kes ini gagal mempraktikkan keluhuran. Peri pentingnya asas-asas keadilan ditegakkan telah diakui bagi mesyuarat-mesyuarat dan siasatan-siasatan dalaman, dan tiada sebab mengapa prinsip yang sama tidak terpakai kepada pendengaran-pendengaran kehakiman. Atas alasan ini sahaja, rayuan sudah boleh dibenarkan.

(2) Jika ianya silap untuk membenarkan rayuan memandangkan halperkara boleh dikembalikan untuk pendengaran semula, berdasarkan apa yang dikatakan di mahkamah ini dan yang tidak dipertikai oleh responden, kedudukanya adalah bahawa petisyen tidak berkompeten untuk diteruskan. Adalah tidak dipertikai bahawa pihak-pihak telahpun bersetuju supaya akaun-akaun disahkan dahulu sebelum penyata yang muktamad ditentukan. Oleh itu, penyata dan tuntutan bolehlah dikatakan sebagai kabur, menjadikan perlakuan responden seperti suatu salah guna proses. Oleh itu, ianya tidak boleh dikatakan bahawa tidak wujud pertikaian *bona fide* terhadap tuntutan. Satu-satunya kelemahan yang ada ialah kegagalan perayu untuk memfailkan afidavit menentang. Walaupun begitu, memandangkan alsan-alasan yang diberi baginya tidak dipertikai oleh responden, alasan-alasan bagi kegagalan tersebut adalah munasabah dalam halkeadaan yang wujud. Jika tidak disebabkan oleh penarikan balik persetujuannya di saat-saat akhir oleh responden, halperkara mungkin tidak pun sampai ke mahkamah. Sesuatu pihak tidak boleh dibiarkan aprobat dan reprobat, kerana ia adalah tidak bermaruah dan tidak adil.

Responden harus juga diestop dari menyangkal bahawa ia sebelumnya telah bersetuju untuk penyelesaian dan terhadap jumlah yang perlu dibayar. Untuk ia mengatakan itu adalah suatu kesilapan menaip adalah amat tidak adil dan tidak munasabah.

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Chong Kok Lim & Ors v. Yong Su Hian [1978] 1 LNS 31 ***(refd)***

Datuk Mohd Sari Datuk Nuar v. Idris Hydraulic (Malaysia) Berhad [1996] 3 CLJ 877 HC ***(refd)***

Development & Commercial Bank Berhad v. Aspatra Corporation Sdn Bhd & Anor [1996] 1 CLJ 141 FC ***(refd)***

Leong Huat Sawmill (Pte) Ltd v Lee Man See [1984] 2 CLJ 157; [1984] 1 CLJ (Rep) 202 FC ***(refd)***

Mascom (M) Sdn Bhd & Ors v. Ken Grouting System Specialist Sdn Bhd [2003] 4 CLJ 803 CA ***(refd)***

Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd [1991] 1 CLJ 260; [1991] 1 CLJ (Rep) 317 SC ***(refd)***

PB Securities Sdn Bhd v. Autoways Holdings Bhd [2000] 4 CLJ 811 CA ***(refd)***

PT Anekapangan Dwitama v. Far East Food Industries Sdn Bhd [1998] 4 CLJ Supp 437 HC ***(refd)***

Re A Company [1985] BCLC 37 ***(refd)***

Re Lord Chesham Cavendish v. Dacre [1886] 31 Ch D 466 ***(refd)***

Re Lundie Bros Ltd [1965] 2 All ER 692 ***(refd)***

Re Lympne Investments Ltd [1972] 1 WLR 523 ***(refd)***

Re Tweeds Garages Ltd [1962] 1 All ER 121 ***(refd)***

Re WR Willcocks & Co Ltd [1974] Ch 163 ***(refd)***

Sabah Finance Berhad v. Addspeed Enterprises Sdn Bhd & Ors [1995] 4 CLJ 645 HC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 218(2)(a)

For the appellant - Tan Chee Keong (Jasmine Teoh with him); M/s CK Tan & Co

For the respondent - Sarojit Kaur; M/s Onn & Partners

[Appeal from High Court, Shah Alam; Companies Winding-Up No: MT2-28-79-2001]

Reported by Suresh Nathan

A

JUDGMENT

Richard Malanjum JCA:

Introduction

B **[1]** The matter before us is an appeal by the appellant (the respondent in the court below) against the decision of the High Court made on 28 September 2001 wherein upon the presentation and hearing of the petition filed by the respondent (the petitioner in the court below) under s. 218 of the Companies C Act 1965 (the Act) it was ordered that the appellant be wound up.

Facts Of The Case

D **[2]** The appellant was incorporated in September 1995 with a paid up capital of RM3,000,000. Its principal business activities include shipping agency representing several shipping lines.

[3] On or about 1 October 1996, the appellant was appointed the shipping agent for a South Korean Shipping Line, Hanjin E Shipping Co Ltd, (Hanjin) which has a regional office based in Singapore. The appellant succeeded the former agent of Hanjin namely, Marine Meridien Sdn Bhd.

[4] Upon the expiry of the agreement between Hanjin and the F appellant, Hanjin appointed the respondent as their agent for Peninsula Malaysia.

[5] Pursuant to an Agency Agreement dated 1 April 2000, the respondent with the consent of their principal, Hanjin, duly appointed the appellant as their exclusive sub-agent for East G Malaysia, ie, Labuan and all of Sabah and Sarawak ports. Added in to the territories however, were Malacca and Kuantan ("the Territories").

[6] Not long after the appointment of the appellant by its letter H dated 23 August 2000 the respondent unilaterally and without assigning any reason thereto terminated the sub-agency of the appellant by giving it a three months' notice in writing and effective from 24 November 2000.

I **[7]** Subsequently the parties or their representatives had several meetings to sort out, verify and settle all the accounts prior to the handing back of the agency on the Territories to the respondent.

[8] During the process of verifying the accounts both parties came out with their own claims or counterclaims against each other.

[9] Whilst the appellant admitted owing the respondent a sum of RM33,595.60 without yet taking into account the sum of RM500,000 it had spent on the instruction of Hanjin to upgrade and renovate the offices in the Territories, the respondent by its letter dated 4 January 2001 claimed that the appellant owed it the sum of RM540,050.76 after deducting the sum of RM54,003 being commission due to the appellant.

[10] Arising from the claim by the respondent the appellant sought for a proper handing over of the business as per in the Agency Agreement which would include the verification and settlement of all accounts between the parties.

[11] The respondent did not favourably respond to the request. Instead it caused to be issued and served on the appellant a notice under s. 218 of the Act.

[12] Subsequently a winding up petition was filed by the respondent seeking to wind up the appellant on the ground of being unable to pay its debt. There was no court judgment against the appellant filed to support the petition.

[13] Upon being served with the petition the new solicitors of the appellant in its letter dated 1 August 2001 offered to settle the outstanding sum of RM194,969 in one payment within seven days from the date of confirmation by the respondent of the said sum. It was also requested that the respondent withhold the advertisement of the petition pending the outcome of the negotiation of the parties.

[14] By a letter dated 6 August 2001 the solicitors for the respondent informed the solicitors of the appellant of their client's agreement to the settlement proposal except that it could not withhold the advertisement of the petition which had been arranged earlier on.

[15] A cheque for the sum of RM194,969 was thus deposited on 15 August 2001 by the appellant to its solicitors with instruction to release the same to the solicitors for the respondent upon fulfilling the request by the appellant that the respondent through its solicitors caused a notice to be advertised that it had withdrawn its winding up petition against the appellant.

[16] However in a meeting held on 7 September 2001 the Managing Director of the respondent refused to take into account all monies advanced or spent by the appellant on behalf and on instruction of Hanjin prior to 1 April 2000. The respondent also failed to account being the new agent for Hanjin all monies including disbursements and advances made by the appellant while as the agent for Hanjin.

[17] Despite the differences between the parties it was agreed during that meeting for the representatives of each party to go through the invoices and claims submitted by the appellant and to verify them with the view to reconcile them with the figures of the respondent.

[18] In view of the pending verification exercise and probable settlement of the matter it was therefore agreed that the parties should seek for a short adjournment of the hearing of the winding up scheduled on 14 September 2001.

[19] Then on the day of hearing of the winding up petition and despite having agreed to a short adjournment the respondent insisted for the hearing to proceed knowing full well that the appellant was no longer within the seven days requirement to file an affidavit in opposition to the winding up petition.

[20] At the same time in a letter dated 14 September 2001 the solicitors for the respondent admitted a discrepancy of RM69.862.61 in the claim stated in the winding up petition.

[21] Meanwhile, on the materials submitted to the respondent for verification the respondent could not dispute the invoices and the advances made by the appellant.

[22] Incidentally, by its letter dated 6 August 2001 the respondent accepted the offer made by the appellant the sum offered as full and final settlement of all sums due from the appellant to the respondent. However by its solicitors' letter dated 17 August 2001 the respondent rejected the offer and claimed that the initial acceptance was due to typo error.

[23] During the hearing of the winding up petition and in view of the stance subsequently adopted by the respondent the learned judge thus refused to adjourn and proceeded to hear the matter resulting in the order to wind up the appellant.

[24] It was also the view of the learned judge that the appellant only came to court to seek for adjournment without making any other preparation in relation to the winding up petition.

[25] Before us learned counsel for the appellant submitted that the learned judge should have adjourned the hearing since the parties were still negotiating for settlement. That explained for the non-filing of an affidavit in opposition. There was no other creditor involved or supporting the petition.

[26] Further it was argued that the winding up under s. 218 was pre-mature since the debt was disputed, there was no court judgment and the appellant had cross-claim in the sum of RM400,000 against the respondent. For these reasons it was submitted that the respondent did not have the *locus standi* to present the petition.

[27] For the respondent it was submitted that the winding up petition was in order and without any affidavit in opposition filed by the appellant the learned judge had no choice but to hear it in the exercise of his discretion and made the order accordingly.

[28] It was also contended that the learned judge was correct in not granting the adjournment since the appellant only came to court to seek for adjournment without making any preparation to answer the winding up petition.

[29] Now, s. 218(2)(a) of the Act reads as follows:

> A company shall be deemed to be unable to pay its debts if:
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorised requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;.

[30] This provision has been judicially considered by our courts in several reported cases. Basically it is intended to provide for a creditor to present a petition for winding up of a company which is unable to pay its debt. *Prima facie* proof of such inability is by way of service of the statutory notice or by some other proof of insolvency. Thus a creditor who has not been paid has the right

to file a petition for winding up notwithstanding his motives for doing so. (See: *Morgan Guaranty Trust Co New York v. Lian Seng Properties Sdn Bhd* [1991] 1 CLJ 260; [1991] 1 CLJ (Rep) 317). Failure of a company to pay as demanded would trigger the presumption that it is unable to pay its debt. But it is a rebuttal presumption in which the onus to rebut is upon the company to show that it is able to pay its debt. (See: *PT Anekapangan Dwitama v. Far East Food Industries Sdn Bhd* [1998] 4 CLJ Supp 437; *Re Lympne Investments Ltd* [1972] 1 WLR 523).

[31] If after being served with the statutory notice the company disputes the debt stated therein then it is for the court to consider on the evidence whether the dispute is *bona fide* before it can be said that the company is to be deemed unable to pay its debts and appropriate to be wound up.

[32] It is to be noted that a dispute as to the precise amount owed would not be a sufficient answer to a petition if it can be established that the petitioner is a creditor for a sum which would otherwise entitle it to a winding-up order. (See: *Re Tweeds Garages Ltd* [1962] 1 All ER 121).

[33] But if the debt is disputed on substantial grounds and the circumstances are sufficient for the court to hold that the presentation of the petition is an abuse of process, the petitioner is either restrained from proceeding with the winding-up or the petition is dismissed.

[34] In considering the petition for winding-up of a company on the ground that it is unable to pay its debt the court must act judiciously and should only consider the allegations contained in the petition and will not go beyond it. (See: *Datuk Mohd Sari Datuk Nuar v. Idris Hydraulic (Malaysia) Berhad* [1996] 3 CLJ 877; *Re Lundie Bros Ltd* [1965] 2 All ER 692).

[35] Indeed, vague allegations in a petition or allegations which were so unsatisfactory as to amount to an abuse of the court would certainly entitle the court to strike out the petition *in limine*. (See: *Re WR Willcocks & Co Ltd.* [1974] Ch 163, [1973] 2 All ER 93; *Re A Company* [1985] BCLC 37, [1974] 1 All ER 256, [1973] 1 WLR 1566).

[36] Reverting to the present appeal it is obvious that the main reason for the learned judge in not granting an adjournment is that the appellant came to court without making any preparation for the hearing except to seek for an adjournment. There was no affidavit in opposition filed.

[37] But with respect the learned judge should have at least listened and considered the explanation given by the learned counsel for the appellant and sought for verification from the learned counsel for the respondent. In that way fairness and fair play are maintained.

[38] Indeed before us learned counsel for the respondent did not dispute the fact that the parties were negotiating before the hearing and that there were meetings between the parties to verify the claims and the cross-claims and set-offs. There was also no dispute that the respondent retracted after agreeing at first to a settlement in the sum of RM184,000. Hence, there must be truth in what was asserted before the learned High Court Judge.

[39] Accordingly, the learned High Court Judge should have at least given the appellant the opportunity to be heard and the time perhaps to file an affidavit in opposition even if he viewed that the petition was in order. In our view the respondent failed to practice fair play in this instance. Indeed the importance of the fundamentals of fair play had been recognized in meetings and domestic enquiries. We see no reason why the same principle should not apply in judicial hearings. (See: *Chong Kok Lim & Ors v. Yong Su Hian* [1978] 1 LNS 31). On this ground alone that we allowed the appeal.

[40] In the event that we are wrong in just allowing the appeal when we could have sent the matter for rehearing, we are also of the view that premised on what were said before us and not disputed by learned counsel for the respondent we find that the petition is incompetent to proceed.

[41] It is not disputed that indeed the parties agreed to have the accounts verified first before the final figure could be ascertained. Thus, the figure and claims can be said to be vague bordering to an abuse of process by the respondent. As such it cannot be said that there is no *bona fide* dispute on the claims. The only shortcoming was the failure by the appellant to file an affidavit in opposition. But given the reason and not disputed by the learned counsel for the respondent we are of the view that the

explanation for such failure is reasonable in the circumstances. If not for the last minute retraction by the respondent the matter might not have even reached the court. We would say that a party should not be allowed to approbate and reprobate. (See: *Re Lord Chesham Cavendish v. Dacre* [1886] 31 Ch D 466; *Development & Commercial Bank Berhad v. Aspatra Corporation Sdn Bhd & Anor* [1996] 1 CLJ 141; *Mascom (M) Sdn Bhd & Ors v. Ken Grouting System Specialist Sdn Bhd* [2003] 4 CLJ 803; *PB Securities Sdn Bhd v. Autoways Holdings Bhd* [2000] 4 CLJ 811; *Sabah Finance Berhad v. Addspeed Enterprises Sdn Bhd & Ors* [1995] 4 CLJ 645). It is unconscionable and plainly unfair.

[42] We also say that the respondent should be estopped from denying that it had earlier on agreed to a settlement and the sum payable. For it then to say that it was a typo error is indeed unfair and unreasonable. (See: *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283; *Leong Huat Sawmill (Pte) Ltd v. Lee Man See* [1984] 2 CLJ 157; [1984] 1 CLJ (Rep) 202).

[43] Thus, for the above reasons that we allowed the appeal with costs.